Supreme Court, U.S.
FILED

97-212 JUL 31 1997

No. OFFICE OF THE CLERK

In The

Supreme Court of the United States

October Term, 1996

JOHN MITCHELL BURNSTINE,

Petitioner,

v.

STATE OF CALIFORNIA,

Respondent.

Petition For Writ Of Certiorari To The Court Of Appeal For The State Of California Fourth Appellate District, Division Three

PETITION FOR WRIT OF CERTIORARI

WILLIAM J. KOPENY
KOPENY & POWELL
A Professional Corporation
8001 Irvine Center Drive, Suite 1170
Irvine, California 92618
(714) 453-2243; FAX (714) 453-1516

Attorneys for Petitioner
John Mitchell Burnstine

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTION PRESENTED

DOES STATE LAW VIOLATE EQUAL PROTECTION WHERE IT PROVIDES FOR ADMINISTRATIVE SUSPENSION OF THE DRIVING PRIVILEGE ON THE BASIS OF A POLICE OFFICER'S ALLEGATION OF EITHER OF TWO FACTS ABOUT A DRIVER; AND AUTOMATICALLY REINSTATES UPON SUBSEQUENT PROOF IN COURT THAT ONE OF THE TWO FACTS IS FALSE, BUT FAILS TO REINSTATE UPON PROOF IN COURT THAT THE OTHER ONE IS FALSE?

(A)

Specifically, where California suspends a driver's license if a police officer tells the Department of Motor Vehicles, either that a driver has driven under the influence, or that a driver has refused a chemical test; does equal protection require the state to treat both drivers equally by reinstating their license if subsequently the officer's statement is disproved in a full evidentiary hearing in court?

(B)

Does California run afoul of the constitutional requirement that similarly situated persons must be treated similarly, where it automatically reinstates the license of a person where he is acquitted of the predicate for his suspension (DUI); but does not reinstate the license of another person where he affirmatively disproves the predicate for his license suspension (refusal of a test)?

TABLE OF CONTENTS

Page

QUESTION PRESENTED..... i

TABLE OF AUTHORITIES..... iii

PETITION FOR WRIT OF CERTIORARI..... 1

OPINION BELOW..... 1

JURISDICTION..... 2

STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED..... 2

HOW THE FEDERAL QUESTION WAS RAISED AND DECIDED BELOW..... 4

SUMMARY OF ARGUMENT..... 7

REASONS FOR GRANTING THE WRIT..... 8

CONCLUSION..... 13

APPENDICES.....App. 1

TABLE OF AUTHORITIES

Page

CASES:

Brennan v. Stewart, 834 F.2d 1248 (5th Cir. 1988) 7

City of Cleburne, Tex. v. Cleburne Living Center, 473 U.S. 432, 105 S.Ct. 3249, 87 L.Ed.2d 313 (1985) ..7, 11

City of New Orleans v. Dukes, 427 U.S. 304 (1976) 8

Dixon v. Love, 431 U.S. 105 (1977) 9

Esmail v. Macrane, 53 F.3d 176 (7th Cir. 1995) 8

Gikas v. Zolin, 6 Cal.4th 841 (1993) 12

LeClair v. Saunders, 627 F.2d 606 (2d Cir. 1980) 8

Mackey v. Montrym, 443 U.S. 1 (1979) 9

Mathews v. Eldridge, 424 U.S. 319 (1976) 9

Nixon v. Administrator of General Services, 433 U.S. 425 (1977) 8

Rabinowitz v. Rogato, 60 F.3d 906 (1st Cir. 1989) 8

Zeigler v. Jackson, 638 F.2d 776 (5th Cir. 1981) 8

STATUTES:

28 U.S.C. Section 1257(3) 2

California Penal Code Section 148 4

California Penal Code Section 851.8 .....2, 5

TABLE OF AUTHORITIES – Continued

Page

California Penal Code Section 851.8(b) 10

California Vehicle Code Section 13353, subdivision (a) 2, 3, 4

California Vehicle Code Section 13353, subdivision (e) 2, 6, 9

California Vehicle Code Section 13353.2, subdivision (a)(1) 3

California Vehicle Code Section 13353.2, subdivision (d) 3

California Vehicle Code Section 13353.2, subdivision (e) 3

PETITION FOR A WRIT OF CERTIORARI

Petitioner, JOHN MITCHELL BURNSTINE, respectfully prays that a writ of certiorari issue to review the decision of the California Supreme Court, and Division Three of the California Court of Appeal for the Fourth Appellate District, reversing a California Superior Court's judgment issuing a writ of mandate compelling the State of California, Department of Motor Vehicles (hereafter "DMV"), to reinstate Mr. Burnstine's driving privilege.

OPINION BELOW

The opinion of the California Court of Appeal, Fourth Appellate District, Division Three, considered and decided respondent's direct appeal on the merits.[1] Thereafter, the state Supreme Court entered a brief order denying discretionary review, which had the legal effect of leaving the opinion of the Court of Appeal undisturbed. Justice Stanley Mosk of the California Supreme Court was of the opinion that review should have been granted. Both the order of the state Supreme Court and the opinion of the court of appeal are reproduced in the Appendix.

[1] Although the opinion was not originally published, the DMV applied for publication and the opinion is now published in the Official California Appellate Reports, at 51 Cal.App.4th 1428, 60 Cal.Rptr.2d 89, 97 Cal.Daily.Op.Serv. 206, 97 Los Angeles Daily Journal, Daily Appellate Report (D.A.R.) 302, 12/09/96, No. G017198.

JURISDICTION

Jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1257(3). This case comes within that provision because it involves a final judgment rendered by the highest Court of one of the States and because Petitioner's rights under the Constitution of the United States are at issue. A petition for review in the state Supreme Court was timely filed, and the order denying the petition for review was filed on April 2, 1997. On July 6, 1996, the Honorable Associate Justice of this Court, Sandra D. O'Connor, granted Petitioner's application for an extension of time to file this Petition to and including July 31, 1997. This Petition is timely filed pursuant to Rule 13.4 of the Supreme Court rules.

STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED

This petition involves the equal protection clause of the Fourteenth Amendment to the United States Constitution, California Vehicle Code Sections 13353, subdivisions (a) and (e) and California Penal Code Section 851.8.

California Penal Code Section 851.8 permits a person such as petitioner to apply to the Municipal Court in which his case was processed but ended without a conviction to enter a finding that the person charged is "factually innocent" of the charges in the criminal complaint.

California Vehicle Code Section 13353, subdivision (a) provides that a person's driving privilege shall be suspended upon, "receipt of an officer's sworn statement

that the officer had reasonbable cause to believe the person had been driving a motor vehicle [under the influence of alcohol] in violation of Section . . . 23152 . . . , and that the person had refused to submit to, or did not complete, the test or tests after being requested by the officer . . . ."

Section 13353.2 subdivision (a)(1) likewise provides for immediate suspension upon arrest by a police officer, or upon receipt of a report by a peace officer stating that the person was driving when he had 0.08 percent or more, by weight, of alcohol in his or her blood.

Section 13353.2, subdivision (d) provides that the DMV shall make a determination of the facts under subdivision (a), and that the department's determination " . . . is final."

Notwithstanding this "finality", California Vehicle Code Section 13353.2, subdivision (e) provides that "[i]f a person is acquitted of criminal charges relating to a determination of facts under subdivision (a), . . . the department shall immediately reinstate the person's privilege to operate a motor vehicle . . . "

There is no comparable provision for a person whose suspension is dependant upon a determination of facts under Section 13353, subdivision (a), refusal to submit to a test.

HOW THE FEDERAL QUESTION WAS RAISED AND DECIDED BELOW

Petitioner was arrested and charged with driving under the influence of alcohol (hereafter "DUI"). The arresting officer also accused him of refusing to submit to a chemical test of his blood, breath or urine for the presence of alcohol or drugs.

Pursuant to California Vehicle Code section 13353, subdivision (a), the DMV followed its administrative procedure to suspend his driving privilege for a period of one year.

At the same time, petitioner was tried for the charge of driving under the influence of alcohol. As a part of the criminal complaint, it was also alleged that petitioner refused a chemical test.

Petitioner's trial ended in a mistrial, with 10 jurors voting for acquittal. Eventually, the DUI complaint was dismissed, and petitioner entered a no contest plea to violating California Penal Code section 148, interfering with an officer in the performance of duties, or resisting arrest.[2]

---

[2] Each of the procedural facts discussed herein was alleged *and admitted* by the Respondent below, the DMV, represented in the Superior Court by the California Attorney General. Each is also reflected in the published opinion of the Court of Appeal.

Petitioner thereafter filed a petition in the appropriate state court[3] for a finding that he was factually innocent of refusing to submit to a chemical test, as alleged in the complaint.

After a thorough review of the trial evidence, police reports, and other evidence, and *upon* the unbargained for stipulation of the prosecutor in the trial, the same judge that had presided over petitioner's trial *granted* the petition, and entered a finding that petitioner is factually innocent of refusing the test.

Under California Penal Code section 851.8, a person may not be adjudged factually innocent unless he not only proves his innocence but also proves there is no reasonable cause to believe the charge or allegation is true.

Petitioner advised the DMV of the fact that he had been adjudicated factually innocent of refusing to submit to the test, and requested reinstatement of his driving license, pointing out that:

- Under California Vehicle Code section 13353.2, subdivision (e), if a person's driving privilege is suspended on the basis of a police officer's accusation that he is guilty of driving under the influence, his license *must be reinstated if he is thereafter acquitted* of the DUI charge.
- He (petitioner) not only established a reasonable doubt that he refused to submit to a chemical test, which would be equal to an

---

[3] The Orange County Municipal Court, for the Harbor Orange County Judicial District. This was the trial court.

acquittal, but he actually carried a much greater burden by prevailing in a factual innocence petition with respect to the allegation that he refused a chemical test.

- Since he eliminated even the reasonable probability that he refused to submit to a chemical test (the predicate for the suspension of his license), which is a much higher standard than that required under California Vehicle Code section 13353(e) which only requires acquittal (the predicate for re-instatement of a license suspended after a DMV administrative finding a driver had driven under the influence) the DMV's failure to reinstate his license amounts to dissimilar treatment of similarly situated persons, in violation of his right to equal protection of the law.

The DMV refused to reinstate petitioner's driving privilege, and he thereafter Petitioned the California Superior Court for a writ of mandate to compel the DMV to reinstate his driving privilege on the theory that the refusal to do so deprived him of equal protection of the law. The Superior Court agreed and issued the writ commanding the DMV to do so, forthwith.

Rather than comply, however, the DMV appealed to the California Court of Appeal for the Fourth Appellate District, Division Three. The Court of Appeal *reversed* the Superior Court judgment, finding that under state law there is no statutory right to reinstatement of a driving privilege suspended on the basis of a DMV finding of refusal to submit to a chemical test, and that there is a legitimate state interest in treating those whom the DMV

has found to refuse but later prove they did not, differently than those whom the DMV has found drove while intoxicated but are later convicted.

The opinion does not squarely address the equal protection issue, despite the fact it was the sole basis of the Superior Court's ruling, and clearly raised in defense of the lower court judgment by petitioner on the appeal.

The California Supreme Court denied petitioner's petition for review.

This Petition follows.

Petitioner seeks Certiorari to review the state court's rejection of the argument that the DMV violated his right to equal protection.

SUMMARY OF ARGUMENT

Petitioner's equal protection claim is straightforward. The equal protection clause "essentially" directs states to treat "all persons similarly situated alike." *City of Cleburne, Tex. v. Cleburne Living Center*, 473 U.S. 432, 439, 105 S.Ct. 3249, 87 L.Ed.2d 313 (1985). It is also violated when governmental action classifies or distinguishes between two or more relevant persons or groups. See e.g., *Brennan v. Stewart*, 834 F.2d 1248, 1257 (5th Cir. 1988).

In addition, it has been recognized that the equal protection clause does not merely protect classes as such, but can extend to protect a single person or a class with

only one member at present[4] and that the heart of the constitutional protection is to guard against both discriminatory and *wholly arbitrary* action. *New Orleans v. Dukes, supra,* 427 U.S. at p. 304.

The present case presents a case of state action which distinguishes between two relevant groups in a wholly arbitrary manner.

If one is entitled to reinstatement of his license suspended for probable cause to believe he drove under the influence, once a court finds him not guilty of that offense, equal protection entitles him to reinstatement of his license, suspended for his refusal to submit to a test, once a court of competent jurisdiction finds him factually innocent of refusing.

REASONS FOR GRANTING THE WRIT

The state of California suspends a person's driving privilege on the basis of an administrative proceeding *either* when that person is suspected, on probable cause, to be driving under the influence, *or* when he or she refuses to submit to a chemical test of blood, breath or

---

[4] See e.g., *City of New Orleans v. Dukes,* 427 U.S. 304 (1976) (per curiam); *Nixon v. Administrator of General Services,* 433 U.S. 425, 472 (1977); *Esmail v. Macrane,* 53 F.3d 176, 180 (7th Cir. 1995); *Rabinowitz v. Rogato,* 60 F.3d 906, 911-912 (1st Cir. 1989); *Zeigler v. Jackson,* 638 F.2d 776, 779 (5th Cir. 1981); *LeClair v. Saunders,* 627 F.2d 606, 609-610 (2d Cir. 1980).

urine on request (or demand) of a police officer.[5] (See Appendix, California Vehicle Code, Section 13353, subdivision (a) [Excerpt]) The clear state purpose of these suspensions are identical, to protect against the possibility of a person driving on the state highways while intoxicated, and each undeniably serves this purpose, as well as to punish those who the DMV finds, through its own procedures may have done so.

Members of these two similarly situated groups are not, however, treated in a similar manner, if they later establish in a full judicial evidentiary proceeding that they in fact do not fit into the group of persons who are subject to suspension.

Members of the first group have a statutory right to reinstatement of their driving privilege, while members of the second (including petitioner) are not granted that benefit.

By state statute,[6] California affords persons whose licenses are suspended for suspicion of driving under the influence reinstatement if they are acquitted of that offense, but no similar provision is made for persons, like

---

[5] This Court recognized in *Mackey v. Montrym*, 443 U.S. 1 (1979) that a similar proceeding in Massachusetts is "summary" in nature and affords a less reliable basis for reaching a conclusion than a full evidentiary hearing. There it was concluded that under *Mathews v. Eldridge*, 424 U.S. 319 335 (1976), and *Dixon v. Love*, 431 U.S. 105, 113 (1977) due process is not offended by a summary proceeding even though it does not afford as effective means of ascertainment of the truth, nor of minimizing the risk of error, as an evidentiary hearing.

[6] California Vehicle Code Section 13353, subdivision (e), reproduced in the Appendix.

petitioner, who establish in a subsequent court proceeding that they did not refuse to submit to a chemical test.

In this case, petitioner took advantage of a state statute that allows a person who is innocent of a criminal charge to establish that fact after criminal proceedings have been dismissed following a mistrial (because of a hung jury). That state statute entitles the person to a finding of factual innocence only after he or she has met a very high burden indeed. To grant a finding of factual innocence under California Penal Code section 851.8, subdivision (b) the court must first find that "no reasonable cause exists to believe that the arrestee committed the offense . . . " and "the initial burden of proof shall rest with the petitioner to show that no reasonable cause exists to believe that the arrestee committed the offense . . . ."

Obviously, to win reinstatement of a license suspended on the basis of an officer's statement that he reasonably believes one was driving under the influence, that person need only raise a reasonable doubt; to win a finding of factual innocence, one must carry a heavier burden.

Nevertheless, state law does not require reinstatement, and the DMV in this case refused to reinstate petitioner's license, despite his obtaining a finding that he was factually innocent of the charge of refusing to submit to a chemical test.

The Superior Court found this distinction to violate petitioner's right to equal treatment by the state, and ordered his license reinstated. On appeal by the DMV,

however, the Court of Appeal rejected this equal protection argument, claiming that the two suspensions served two *different* rational purposes.

The Court of Appeal first notes that it is the province of the Legislature to make the rules. But, of course, this is always true. In the context of the equal protection clause, the question is whether those rules fail to treat "all persons similarly situated alike." *City of Cleburne, Tex. v. Cleburne Living Center, supra,* 473 U.S. 432, 439, 105 S.Ct. 3249, 87 L.Ed.2d 313.

The Court of Appeal did recognize that "the Legislature made the policy decision that a person acquitted of the criminal charge of willful refusal to take a chemical test may still have his or her license suspended administratively" but concluded that "different policy decisions are rationally related to the goals of the specific statutes" so "the DMV was not required to reinstate Burnstine's driver's license."

The analysis of the Court of Appeal suffers in three ways: (1) It is conclusory;[7] (2) It relies on a rule that is irrelevant to this case;[8] (3) It fails to identify any *rational*

---

[7] Although the Court of Appeal opinion *says* there is a legislative goal served by not reinstating in this instance, which is "rationally related to the goals of the specific statutes" the opinion does not identify any such goal – especially once there is a finding of factual innocence.

[8] The opinion states that "An acquittal of the criminal charge of driving under the influence obviously has a direct bearing on the administrative suspensions since the two proceeding functionally resolve the same issue." While this is true, it is equally true of the administrative proceeding and the

state interest in withholding reinstatement from those who prove under the high standard of the "factual innocence" rubric that they did not wilfully refuse a test.

Finally, although the court suggests that the "wilful" element of the refusal is a distinguishing element of the criminal version of the refusal not required for the administrative suspension, it fails to explain how this removes the court proceeding from "functionally resolving" the same issue, or how this makes the state's failure to reinstate the license of someone who has proven that there is no reasonable cause to believe he has wilfully refused a test anything other than "wholly arbitrary" when it reinstates the license of one whose license was suspended on mere probable cause to believe he drove under the influence after an acquittal. Clearly, state law shows that it is legally and factually possible for the acquitted person to have been *actually guilty* of the crime of driving under the influence, yet the state mandates reinstatement of his license, even though the administrative hearing properly suspended it after finding there was probable cause he drove while intoxicated. Surely the state's interest in protecting the roadways from drunk drivers is not served by refusing to reinstate the license of a person who was administratively found to have refused

---

factual innocence finding vis. the refusal. Also, the lower court's citation to *Gikas v. Zolin* (1993) 6 Cal.4th 841, 852-853 to the effect that "the Legislature has the power to make administrative suspension proceeding of the case completely independent of the criminal" case is irrelevant. Here, the Legislature did not do that. In the case of one driver it made the criminal proceeding a "trump card" over the administrative decision, but in petitioner's case it denied him the same benefit.

a test, *but then proved in a full court proceeding under an exacting burden of proof that he did not do so.*

CONCLUSION

For all these reasons, this Court is urged to grant the writ and reverse the judgment of the state Court of Appeal reversing the Superior Court's order reinstating Petitioner's driving privilege.

WHEREFORE, Petitioner prays that this Honorable Court grant his Petition and issue its Writ of Certiorari.

Respectfully submitted this 31st day of July, 1997.

WILLIAM J. KOPENY
KOPENY & POWELL, P.C.
8001 Irvine Center Drive
Suite 1170
Irvine, California 92518
(714) 453-2243; (714) 453-1516

Counsel of Record for Petitioner
Joel Mitchell Burnstine
(aka John Mitchell Burnstine)

APPENDIX

Fourth Appellate District, Division Three,
No. G017198 S058523

IN THE SUPREME COURT OF CALIFORNIA

JOHN MITCHELL BURNSTINE, Respondent

v. (Filed Apr. 2, 1997)

DEPARTMENT OF MOTOR VEHICLES, Appellant

Respondent's petition for review DENIED.

Mosk, J., is of the opinion the petition should be granted.

(stamp) GEORGE
Chief Justice

IN THE COURT OF APPEAL OF THE
STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

JOHN MITCHELL BURNSTINE, Plaintiff and Respondent, v. DEPARTMENT OF MOTOR VEHICLES, Defendant and Appellant.	G017198 (Super. Ct. No. 738738) **OPINION** (Filed Dec. 9, 1996)

Appeal from a judge of the Superior Court of Orange County, Sheila Fell, Temporary Judge. (Pursuant to Cal. Const., art. VI, § 21.) Reversed.

Daniel E. Lungren, Attorney General, Silvia Diaz and Mary Horst, Deputy Attorneys General, for Defendant and Appellant.

William J. Kopeny for Plaintiff and Respondent.

* * *

THE COURT*:

John Mitchell Burnstine was arrested for driving under the influence of alcohol. According to the officer's statement, when Burnstine was asked to take a blood, breath, or urine test, he refused: "[Driver] Burnstine very uncooperative in answering questions. Chem[ical] test adm[onition] read twice. [Driver] Burnstine interrupted

and changed subjects repeatedly. When asked which test he wanted to take [driver] Burnstine shrugged shoulders and refused to answer." Based on the officer's statement, the Department of Motor Vehicles (DMV) issued an administrative per se order suspending Burnstine's driver's license. (Veh. Code, § 13353.) Burnstine requested a departmental review of the suspension. The administrative order was upheld and Burnstine never contested it.

Meanwhile, a criminal complaint was filed alleging Burnstine had been driving under the influence of alcohol in violation of Vehicle Code section 23152, subdivision (a). The complaint further alleged Burnstine willfully refused to complete a blood, breath, or urine test. Following a jury trial, a mistrial was declared (the vote was 10-2 for acquittal). Burnstine then pled guilty to a charge of resisting arrest (Pen. Code, § 148), and all other charges were dismissed. Several months later, and on Burnstine's motion, the municipal court entered an order of "factual innocence" pursuant to Penal Code section 851.8. Based on this order, Burnstine demanded that the DMV reinstate his license. When the DMV refused, he filed a petition for writ of mandate under Code of Civil Procedure section 1085, which the superior court granted.

Although the parties express the issue in different ways, fundamentally the question is: Does the DMV have a mandatory duty to reinstate a person's driver's license suspended pursuant to Vehicle Code section 13353 if that person is later found factually innocent of a criminal charge of willfully refusing to take a chemical test? The answer is no.

Unlike Vehicle Code section 13353.2 (which governs the suspensions of driver's licenses for driving with a blood alcohol concentration of .08 or more),[1] section 13353 has no similar provision requiring the reinstatement of a person's driver's license on a judicial finding of acquittal.[2] Recognizing there is no statutory right to reinstatement, Burnstine makes an equal protection argument. He asserts it is unfair for a person who is acquitted of a drunk driving charge to have the ability to have their license reinstated while a person who is found factually innocent of willful refusal to test must still suffer an administrative suspension.

Burnstine's equal protection "as applied" argument is unpersuasive. It is beyond cavil that the Legislature has the power to set the penalties to be imposed for offenses. Moreover, in the arena of administrative proceedings our Supreme Court noted in *Gikas v. Zolin* (1993) 6 Cal.4th 841

---

[1] Subdivision (e) of Vehicle Code section 13353.2 states, in part: "If a person is acquitted of criminal charges relating to a determination that [the person was driving with a blood alcohol concentration of .08 percent or more . . .], the department shall immediately reinstate the person's privilege to operate a motor vehicle if the department has suspended it administratively. . . . "

[2] Subdivision(a) of Vehicle Code section 13353 states, in part: "If any person refuses the officer's request to submit to, or fails to complete, a chemical test or tests pursuant to Section 23157, upon receipt of the officer's sworn statement that the officer had reasonable cause to believe the person had been driving a motor vehicle in violation of Section . . . 23152 . . . and that the person had refused to submit to, or did not complete, the test or tests after being requested by the officer . . . " the department shall suspend or revoke the person's privilege to drive.

at pages 852 to 853, that "an acquittal in a criminal case doe [sic] snot [sic] necessarily preclude administrative proceedings based upon the same facts" because the Legislature has the power to make "the administrative suspension proceeding of [the] case completely independent of the criminal." And "[a]bsent constitutional constraints, when the Legislature has established policy, it is not for the court to differ." (*Id.* at p. 851, citations omitted, fn. omitted.)

Although the drivers in these two situations are treated differently that is because different policy considerations are at stake. In a driving under the influence case, the license suspension is for driving with a blood alcohol concentration of .08 percent or more. An acquittal of a criminal charge of driving under the influence obviously has a direct bearing on the administrative suspension since the two proceedings functionally resolve the same issue. Under those circumstances, the Legislature made the policy decision that a person acquitted of the criminal charge of driving under the influence may not have his or her license suspended administratively.

Here, however, the factual finding of innocence came in a criminal case where the issue to be decided was whether Burnstine had willfully refused to take a chemical test. But, under the implied consent law, it has long been held that a refusal to take a chemical test does not require an intentional (or even purposeful) refusal; it occurs, quite simply, when the driver does not take one of the chemical tests. (*Bush v. Bright* (1968) 264 Cal.App.2d 788, 791 [suspension proper even through driver's intoxication rendered him incapable of refusing test].) In short, the criminal case resolved a discrete issue not involved in

the administrative hearing. (*Ellis v. Pierce* (1991) 230 Cal.App.3d 1557, 1562 [driver's license suspension statute differs from statute imposing refusal enhancement in that the former does not require willful refusal].) Under those circumstances, the Legislature made the policy decision that a person acquitted of the criminal charge of willful refusal to take a chemical test may still have his or her license suspended administratively.

Because the different policy decisions are rationally related to the goals of the specific statutes, we conclude the DMV was not required to reinstate Burnstine's driver's license. Accordingly, the judgment is reversed. The DMV shall recover its costs on appeal.

*Before Sills, P.J., Crosby, J., and Rylaarsdam, J.

§13353. Failure or Refusal to Submit to Intoxication Tests.

(a) If any person refuses the officer's request to submit to, or fails to complete, a chemical test or tests pursuant to Section 23157, upon receipt of the officer's sworn statement that the officer had reasonable cause to believe the person had been driving a motor vehicle in violation of Section 23140, 23152, or 23153, and that the person had refused to submit to, or did not complete, the test or tests after being requested by the officer, the department shall do one of the following:

(1) Suspend the person's privilege to operate a motor vehicle for a period of one year.

* * *

§13353.2 Immediate Suspension of Driver's License – Blood Alcohol Level Exceeding Set Limits.

(a) The department shall immediately suspend the privilege of any person to operate a motor vehicle for any one of the following reasons:

(1) The person was driving a motor vehicle when the person had 0.08 percent or more, by weight, of alcohol in his or her blood.

* * *

(d) The department shall make a determination of the facts in subdivision (a) on the basis of the report of a peace officer submitted pursuant to Section 23158.2. The determination of the facts, after administrative review

pursuant to Section 13557, by the department is final, unless an administrative hearing is held pursuant to Section 13558 and any judicial review of the administrative determination after the hearing pursuant to Section 13559 is final.

(e) The determination of the facts in subdivision (a) is a civil matter which is independent of the determination of the person's guilt or innocence, shall have no collateral estoppel effect on a subsequent criminal prosecution, and shall not preclude the litigation of the same or similar facts in the criminal proceeding. If a person is acquitted of criminal charges relating to a determination of facts under subdivision (a), or if the person's driver's license was suspended pursuant to Section 23137 and the department finds no basis for a suspension pursuant to that section, the department shall immediately reinstate the person's privilege to operate a motor vehicle if the department has suspended it administratively pursuant to subdivision (a). . . .

* * *

§851.8 [See Note] Sealing and Destroying Record of Person Factually Innocent.

* * *

(b)

* * *

The district attorney may present evidence to the court at such hearing. Notwithstanding Section 1538.5 or 1539,

any judicial determination of factual innocence made pursuant to this section may be heard and determined upon declarations, affidavits, police reports, or any other evidence submitted by the parties which is material, relevant and reliable. A finding of factual innocence and an order for the sealing and destruction of records pursuant to this section shall not be made unless the court finds that no reasonable cause exists to believe that the arrestee committed the offense for which the arrest was made. In any court hearing to determine the factual innocence of a party, the initial burden of proof shall rest with the petitioner to show that no reasonable cause exists to believe that the arrestee committed the offense for which the arrest was made. If the court finds that this showing of no reasonable cause has been made by the petitioner, then the burden of proof shall shift to the respondent to show that a reasonable cause exists to believe that the petitioner committed the offense for which the arrest was made.

* * *

(c) In any case where a person has been arrested, and an accusatory pleading has been filed, but where no conviction has occurred, the defendant may, at any time after dismissal of the action, petition the court which dismissed the action for a finding that the defendant is factually innocent of the charges for which the arrest was made. A copy of such petition shall be served on the district attorney of the county in which the accusatory pleading was filed at least 10 days prior to the hearing on the petitioner's factual innocence. The district attorney may present evidence to the court at such hearing. Such hearing shall be conducted as provided in subdivision

(b). If the court finds the petitioner to be factually innocent of the charges for which the arrest was made, then the court shall grant the relief as provided in subdivision (b).

* * *